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No. 80-308

IN THE

Supreme Court of the United States

October Term, 1980

ORTHO PHARMACEUTICAL CORPORATION,
Petitioner,
v.
SONDRA L. McKENNA and
JAMES R. McKENNA,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

In this personal injury action should this Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, in order to review that Court's interpretation of Ohio law relating to the application of that state's statute of limitations? [Ohio Rev. Code Ann., §2305.10 (p. 1954)]

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SUPPLEMENTAL STATEMENT OF THE CASE

This personal injury action was instituted by the Respondents McKenna in the Court of Common Pleas of Allegheny County, Pennsylvania. It was removed by Petitioner, Ortho Pharmaceutical Corporation, to the District Court of the United States for the Western District of Pennsylvania, pursuant to 28 U.S.C. §1441(b).

Ortho petitioned the District Court to transfer the action to the Federal Court in Ohio. The equities for retaining the suit in Pennsylvania favored plaintiffs and the transfer motion was refused by the Federal Court in an Order dated February 27, 1975.

Mrs. McKenna, at the age of 27 years, acted under the direction of a physician (Dr. Sanford Press) and began taking Ortho's oral contraceptive drug, "Ortho-Novum," in January 1965. Respondents were assured by a brochure published by Ortho that the drug involved no risk of serious side effects. (56a) In reliance upon this written assurance, Mrs. McKenna continued to use the drug for four and one-half years, until July 1969. (125a) In 1967 she developed severe headaches; thereafter she had two attacks of transient ischemia; and hypertension developed in June 1969. (84a) Dr. Press assured her that the Ortho-Novum was not causing the symptoms. On March 2, 1972, the contraceptive drug taken by Mrs. McKenna caused her to suffer a catastrophic stroke which has left her permanently and totally disabled. (192a-183a)

Respondents neither knew, nor could they reasonably have known, until after the stroke, that the adverse effects suffered by Mrs. McKenna were related to the "pill."

This product liability action was filed on November 28, 1973, one year and nine months after the stroke,

which was approximately four years after the hypertension had been manifested.

At the close of the trial, the District Court directed a verdict in favor of Ortho on the ground that suit was not brought within two years after June 1969 and, therefore, the actions were barred by the Ohio statute of limitations.

The Third Circuit reversed the lower court (March 18, 1980) and declared that the Supreme Court of Ohio, in applying the law of that state, would toll the operation of the statute until Respondents knew, or reasonably could have known, that Mrs. McKenna's adverse reactions and stroke were caused by the Ortho-Novum. One judge dissented on the ground that Ohio would apply the "unenlightened" and "archaic" rule whereby the McKennas' claim would be barred before they had knowledge of its existence. (Petition, pp. a20, a29)

On March 13, 1980, the Ohio Legislature enacted a statute wherein it assured the victims of chromium and asbestos poisoning that their causes of action would arise on the date when they were informed, or upon the date when they reasonably should have known, that they were suffering from the disease. Thereupon, Ortho petioned the Third Circuit for rehearing on the ground that under the amendment to the limitation statute an application of the doctrine of *expressio unius est exclusio alterius* barred Respondents' claims. It argued that the Legislature preserved only actions due to asbestos and chromium from operation of the statute of limitations where the victim was ignorant of his cause of action. Therefore, *all other* trespass actions of any kind were barred two years after the occurrence, even though

the victim had no knowledge of his cause of action. It based this argument on the legal maxim *expressio unius est exclusio alterius*. On June 17, 1980 the Third Circuit refused the rehearing petition, after having considered further briefs from both parties.

SUMMARY OF RESPONDENTS' ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

There is no valid basis for Petitioner's request that this Court issue a Writ of Certiorari. Its request does not fall within the character of reasons for the issuance of such writ as the same are set forth in Rule 17 of this Court. Ortho's sole complaint is that the Third Circuit did not correctly determine the law of Ohio with reference to its applicable statute of limitations.

No conflict between decisions of different courts of appeal is involved. There is no question of the construction of any Act of Congress. No state statute has been declared unconstitutional. On the precise issue involved the Ohio Supreme Court has not rendered a decision; but in an analogous case the Court has declared that the "discovery" rule applies and that the statute of limitations is tolled until the injured party knows, or reasonably should know, of its existence.

Lower court decisions are not controlling in determining the law of the state of Ohio on the subject.

A recent amendment to Ohio's statute of limitations protects victims of chromium and asbestos disease from operation of the statute while they have no knowledge of their cause of action. This amendment neither by reference nor inference deprives other injured parties of the right to a tolling of the statute of limitations in their cases.

REASONS FOR DENYING A WRIT OF CERTIORARI

The Supreme Court of Ohio has decided numerous cases in which it interpreted the Ohio statute of limitations, but there was no decision of that Court which was in point in the present case. It, accordingly, became the duty of the Third Circuit to determine the Ohio law as it would apply in this case. Ortho objects to the Circuit's interpretation. The sole issue before this tribunal is: Did the Third Circuit properly interpret Ohio law when it declared that the Supreme Court would toll the running of the statute of limitations until Respondents knew, or reasonably should have known, of their causes of action?

If this Court were to review all cases decided by the Circuits, wherein this type of narrow non-federal issue exists, it would be so overwhelmed that it could not function. In its Rule 17, this Court suggests the character of reasons for which it may issue writs of certiorari. The present case does not fall within the restricted area of that group. The question involved is not federal law, but only the application of state law in a diversity case; no act of Congress is under consideration; and the Circuit has not departed from the accepted course of judicial proceedings.

The injury for which the plaintiffs brought suit was a stroke brought on by defendant's oral contraceptive drug. Their action for such was filed within the two year statute of limitations. The Third Circuit ruled that even if the cause of action was held to arise when the drug produced the early symptom of hypertension, more than two years prior to suit, the operation of the statute was

tolled until plaintiffs knew, or reasonably should have known, of their causes of action.

There are strong reasons to support the Circuit's interpretation of Ohio law. In determining when the statutory period will commence, there are a number of significant decisions of the state and federal courts in Ohio and, it was not necessary to rely upon lower court opinions as Ortho urges.

In a line of medical malpractice cases, the Supreme Court has ruled that the statutory period would not operate in Ohio from the date of the physicians' wrong (the "traditional" rule); but to meet the ends of justice the two-year period would not begin until the physician-patient relationship has terminated.[1]

A significant indication of the direction in which Ohio's Supreme Court is moving, in an effort to protect injured parties from the harsh "traditional" rule, is the decision in 1972 in *Melnyk v. Cleveland Clinic,* 32 Ohio State 2d 198, 290 N.E. 916. This was a malpractice action in which a foreign object had been left by the defendant in the patient's abdomen. Sometime after the elapse of the two year limitation period, the patient discovered the cause of his pain and disability. A unanimous court espoused the "discovery" rule and held that the two-year statute was tolled until the victim knew,

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1. *Bowers v. Santee* (1919), 99 Ohio State 361, 124 N.E. 238

Ishler v. Miller (1978), 56 Ohio State 2d 447, 384 N.E. 2d 296

Gillette v. Tucker (1902), 67 Ohio State 106, 65 N.E. 865

DeLong v. Campbell (1952), 157 Ohio State 22, 104 N.E. 2d 177

or reasonably should have known, of his tortious injury. This decision is particularly significant since a divided Court (four to three) had ruled in 1971, in the case of *Wyler v. Tripi,* 25 Ohio State 2d 164, 267 N.E. 2d 419, that as against the plaintiff in a medical malpractice action the Court would not apply the statute of limitations from the date of injury. Its operation would begin when the physician-patient relationship terminated. However, the Court refused to apply the more liberal "discovery" rule under which the statute would operate from the date of the victim's discovery of his cause of action. In 1972, the Ohio Supreme Court, in *Melnyk,* refused to follow *Wyler* but, instead, ruled that in this foreign object malpractice action the statute of limitations was tolled until the plaintiff-patient learned of his right of action.

Cases in other jurisdictions have analogized the "foreign object" malpractice actions with those product liability suits where deleterious drugs were ingested by the victim. The operation of the statute of limitations was similarly limited to protect the plaintiff. [*Raymond v. Eli Lilly and Co.,* 412 F. Supp. 1392 (D.N.H. 1976); *Gilbert v. Jones,* ..... Tenn. ....., 523 S.W. 2d 211 (Ct. of Appeals of Tenn., Western Sec. 1974; certiorari denied by Supreme Court 1975)]

A frequently cited Ohio case decided in 1960 by the Sixth Circuit Court of Appeals is *Brush Beryllium Co. v. Meckley,* 284 F.2d 797. Plaintiff had contracted the disease of berylliosis as a result of defendant's negligence, but was not aware of the same until the two-year statutory period had expired. The Court of Appeals ruled that the Ohio limitations statute did not operate until the disease manifested itself and was diagnosed

as such. It held that the plaintiff's cause of action did not accrue until after the two year period had elapsed and, hence, the plaintiff was not barred. This case was cited and followed in *Stewart v. Sachs,* 55 00 (2d) 271, 273 (1971).

In its movement toward consumer protection in product liability cases, the Supreme Court of Ohio, in 1977, for the first time, adopted the law of strict liability, as such is set forth in Section 402A of the Restatement, Second, Law of Torts, in the case of *Temple v. Wean United, Inc.,* 50 Ohio State 2d 317, 364 N.W. 2d 267.

In a further development of this trend, the Court of Appeals of Hamilton County decided the case of *Seley v. G. D. Searle & Co.,* 15 Ohio Opinions 3d Series, January 1980. The Court ruled that a manufacturer of contraceptive pills, which distributes promotional literature about its product directly to patients, has a duty to warn the prospective patients directly of any hazard in the drug and not merely the prescribing physician.

Ortho argues that the Third Circuit was bound to follow several lower court Ohio cases, which did not protect the injured party against the statute of limitations barring a claim even before the victim knew, or could have known, that he had a cause of action. These decisions were not binding on the Circuit Court.

Respondents submit that the Ohio Supreme Court decisions are controlling. It was stated in *Western Pennsylvania National Bank v. American Insurance Co. of Newark, N. J.,* 428 F.2d 1220 (3rd Cir. 1970):

> "In a diversity action we are governed by the state substantive law as pronounced by the state's high-

est court. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)."

In support of its complaint that the Third Circuit did not follow the lower court Ohio decisions, the Petitioner cited *Commissioner v. Estate of Bosch,* 387 U.S. 456; 87 Supreme Court 1776 (1967). While this tribunal said that federal courts should attribute some weight to non-binding lower state court decisions, it also said:

> "And (citation) this Court further held that 'an intermediate appellate state court * * * is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" (p. 465) (Emphasis Supplied)

Baughman v. Bolinger, M.D. (1980), 485 F. Supp. 1000, (D. C. S. D. Ohio), is a significant recent Ohio federal court case interpreting Ohio personal injury statute of limitation law and the *Melnyk* case. The husband plaintiff had been injured through medical malpractice. The question arose as to whether the wife's action for loss of consortium arose at the time of the husband's injury or at a much later date when he discovered it. Based on the federal court's interpretation of *Melnyk,* it ruled that the period of limitations operated from the date of discovery of the defendant Dr. Bolinger's wrongdoing. The District Court noted that the foreign object distinction and the "discovery" exception are based on "the sound public policy deriving from the absolute dependence of a patient upon his physician during surgery." (p. 1003) Likewise, as in the present case, the user of a drug is wholly dependent upon the company which manufactures, sells, tests that

drug for harmful side effects, and advertises that it is safe and free from any serious adverse reactions.

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The Amendment to the Ohio Limitations Statute

At about the time the Circuit Court decided this case, the Ohio Legislature amended the statute of limitations. (See Ortho's Petition, p. 2) It assured persons who had claims arising out of exposure to asbestos or chromium that their actions would not be barred before they had knowledge of their claims.

Shortly following the amendment, Ortho petitioned the Circuit Court for a rehearing. It urged that since the legislature had preserved only asbestos and chromium claims, by assuring that the "discovery" rule would delay the application of the limitations period, that this protection was thereby eliminated from all other personal injury actions. It asserted the maxim of *expressio unius est exclusio alterius.*

An answer to this contention is that if the Legislature had intended such a drastic change in Ohio law, it could readily have said so. It did not.

Another answer is that the doctrine of *expressio unius est exclusio alterius* has limited application in Ohio. It is provided in 50 Ohio Jurisprudence 189 (relied upon by Ortho) that this maxim is "not of universal application and caution should be exercised in its use."

Finally, the interpretation of the amendment urged by Petitioner is that it determines in all cases that the cause of action *accrues* as of the date of injury. However, the legal theory adopted by the Third Circuit in the present case is the one that was invoked by the Ohio

Supreme Court in *Melnyk,* namely, that the application of the statute of limitations is *tolled* in Ohio until the victim knows, or reasonably should have known, of her cause of action.

In its second Opinion in this case, the Circuit Court decided that when the Ohio Legislature amended the limitations statute to protect the victims of two diseases from the inequitable result of having their actions barred before they could know of or exercise their rights, that it did not thereby intend to deprive every other citizen of Ohio of the "discovery" right in trespass actions. Such a conclusion was neither explicit nor implicit in the amendment.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

CONCLUSION

The single issue decided by the Third Circuit Court of Appeals, namely, whether the Supreme Court of Ohio would toll its statute of limitations under the circumstances of this drug case, is not one that merits a review by the Supreme Court of the United States. The issue in this case is clearly outside the ambit of Rule 17 of this Court, which sets forth the type of questions that merit the issuance of writs of certiorari to Circuit Courts.

From the two Opinions which the Third Circuit wrote in this case, it is evident that a scholarly study was made of relevant decisions of the Ohio Supreme Court, as well as of other pertinent authorities.

In reaching its decision, the Circuit Court made an assumption that favored Ortho, namely, that the date of injury was the time that Mrs. McKenna developed hypertension. Respondents contended the occurrence of the stroke was the date of injury. Irrespective of when the injury occurred, the statute of limitations was tolled until Respondents knew, or reasonably could have known, of the cause of Mrs. McKenna's condition.

Respectfully submitted,

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